

# HOUSE BILL No. 1187

---

## DIGEST OF INTRODUCED BILL

**Citations Affected:** IC 23-17.

**Synopsis:** Nonprofit corporations. Provides that notice given by a nonprofit corporation (corporation) is fair and reasonable if the corporation provides notice by: (1) communicating in person; (2) mail or other method of delivery; or (3) telephone, voice mail, or other electronic means. Provides that a corporation, other than a veteran's corporation, that has more than 1,000 members may give notice by radio, television, or other form of public broadcast communication. (Current law allows for notice by publication in a newspaper.) Allows notice to be given to certain domestic or foreign corporations' registered agents at registered offices or to the domestic or foreign corporation or its secretary at its principal office. Requires a corporation to maintain a notice in a record unless oral notice is reasonable under the circumstances. Establishes when notice is effective. Requires a corporation to retain ballots for a certain period. Establishes circumstances under which contracts or transactions that involve conflicting interests of members, directors, members of a designated body, or officers are not void or voidable. (Current law establishes the circumstances under which contracts or transactions that involve conflicting interests of directors are not void or voidable.) Establishes immunity from liability for directors unless the party asserting liability meets certain requirements. Amends provisions that restrict certain actions by committees of directors. Allows: (1) boards of directors; and (2) members present at a committee meeting; to appoint alternate members of a committee. Allows corporations to create or authorize the creation of advisory committees. Provides that a director or member of a corporation may bring a derivative proceeding. Establishes requirements regarding derivative proceedings. Repeals a provision that is replaced concerning conflicting interest contracts or transactions.

**Effective:** July 1, 2008.

---

---

**Lawson L, Thomas**

---

---

January 10, 2008, read first time and referred to Committee on Judiciary.

---

---



C  
o  
p  
y

Introduced

Second Regular Session 115th General Assembly (2008)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2007 Regular Session of the General Assembly.

## HOUSE BILL No. 1187

A BILL FOR AN ACT to amend the Indiana Code concerning business and other associations.

*Be it enacted by the General Assembly of the State of Indiana:*

- 1 SECTION 1. IC 23-17-2-11.5 IS ADDED TO THE INDIANA  
2 CODE AS A **NEW** SECTION TO READ AS FOLLOWS  
3 [EFFECTIVE JULY 1, 2008]: **Sec. 11.5. "Electronic transmission"**  
4 **or "electronically transmitted" means any process of**  
5 **communication not directly involving the physical transfer of**  
6 **paper that is suitable for the retention, retrieval, and reproduction**  
7 **of information by the recipient of the information.**  
8 SECTION 2. IC 23-17-2-15.5 IS ADDED TO THE INDIANA  
9 CODE AS A **NEW** SECTION TO READ AS FOLLOWS  
10 [EFFECTIVE JULY 1, 2008]: **Sec. 15.5. (a) "In writing" includes**  
11 **any form or recorded message capable of comprehension by**  
12 **ordinary visual means.**  
13 **(b) The term includes a message electronically transmitted.**  
14 SECTION 3. IC 23-17-2-26.5 IS ADDED TO THE INDIANA  
15 CODE AS A **NEW** SECTION TO READ AS FOLLOWS  
16 [EFFECTIVE JULY 1, 2008]: **Sec. 26.5. "Sign" or "signature"**  
17 **includes:**

2008

IN 1187—LS 6776/DI 110+



C  
o  
p  
y

(1) a manual, a facsimile, a conformed, or an electronic signature; or

(2) any other manifestation of an intention to execute a document or record.

SECTION 4. IC 23-17-2-27 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2008]: Sec. 27. (a) "Vote", ~~includes~~ authorization by written ballot and "voting", or "casting a vote" includes the giving of written consent.

(b) Even if a person entitled to vote characterizes the conduct as voting or casting a vote, the term does not include:

(1) recording the fact of abstention or failing to vote for a candidate; or

(2) approving or disapproving of a matter.

SECTION 5. IC 23-17-10-5 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2008]: Sec. 5. (a) A corporation shall give notice ~~consistent with the corporation's bylaws~~ of meetings of members in a fair and reasonable manner.

(b) A notice that conforms to the requirements of subsection (c) is fair and reasonable. However, other means of giving notice may also be fair and reasonable when all the circumstances are considered if notice of matters referred to in subsection (c)(2) is given as provided in subsection (c).

(c) Unless fair and reasonable notice is otherwise specified in a corporation's bylaws, notice is fair and reasonable if the following occur:

(1) The corporation notifies the corporation's members of the place, date, and time of each annual, regular, and special meeting of members not less than ten (10) days, or, if notice is mailed by other than first class or registered mail, thirty (30) days to sixty (60) days, before the meeting date.

(2) Notice of an annual or a regular meeting includes a description of any matter or matters to be considered at the meeting that must be approved by the members under ~~IC 23-17-13-2~~, IC 23-17-13-2.5, IC 23-17-16-13, IC 23-17-17-5, IC 23-17-19-4, IC 23-17-20-2, or IC 23-17-22-2.

(3) Notice of a special meeting includes a description of the purpose for which the meeting is called.

(4) A corporation provides notice by:

(A) communicating in person;

(B) mail or other method of delivery; or

(C) telephone, voice mail, or other electronic means.

~~(4)~~ (5) For a corporation, other than a veteran's organization,

C  
o  
p  
y



having more than one thousand (1,000) members, notice of the place, date, and time of an annual, a regular, or a special meeting, and in the case of a special meeting, the purpose of the special meeting, may be given by:

(A) one (1) publication in a newspaper of general circulation, printed in English, in the county in which the corporation has the corporation's principal office; or

(B) radio, television, or other form of public broadcast communication;

if the publication or broadcast is made not less than ten (10) days and not more than thirty (30) days before the meeting date.

(d) Notice to a domestic corporation or a foreign corporation that is authorized to transact business in Indiana may be addressed to:

(1) its registered agent at its registered office; or

(2) the domestic corporation or foreign corporation or its secretary at its principal office shown in its:

(A) most recent annual report if it has delivered its annual report; or

(B) application for a certificate of authority if it has not yet delivered an annual report.

(e) Unless the bylaws require otherwise, if an annual, a regular, or a special meeting of members is adjourned to a different date, time, or place, notice is not required to be given of the new date, time, or place if the new date, time, or place is announced at the meeting before adjournment. If a new record date for the adjourned meeting is or must be fixed under section 7 of this chapter, however, notice of the adjourned meeting must be given under this section to persons who are members as of the new record date.

SECTION 6. IC 23-17-10-5.5 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2008]: Sec. 5.5. (a) A corporation shall maintain a notice provided under this article in a record unless oral notice is reasonable under the circumstances.

(b) A notice is effective at the earliest of the following:

(1) If electronically transmitted, the date the notice was received by a member when electronically transmitted in a manner authorized by the member.

(2) If the notice was mailed postpaid and correctly addressed, five (5) days after the notice was deposited in the United States mail.

(3) The date shown on the return receipt if the:

C  
o  
p  
y



**(A) notice was sent by registered or certified mail, return receipt requested; and**

**(B) return receipt is signed by or on behalf of the addressee.**

SECTION 7. IC 23-17-10-8 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2008]: Sec. 8. (a) Unless prohibited or limited by articles of incorporation or bylaws, an action that may be taken at an annual, a regular, or a special meeting of members may be taken without a meeting if the corporation delivers a written ballot to every member entitled to vote on the matter.

(b) A written ballot must do the following:

(1) Set forth each proposed action.

(2) Provide an opportunity to vote for or against each proposed action.

(c) Approval by written ballot under this section is valid only when the following occur:

(1) The number of votes cast by ballot equals or exceeds the quorum required to be present at a meeting authorizing the action.

(2) The number of approvals equals or exceeds the number of votes that would be required to approve the matter at a meeting at which the total number of votes cast was the same as the number of votes cast by ballot.

(d) A solicitation for votes by written ballot must do the following:

(1) Indicate the number of responses needed to meet the quorum requirements.

(2) State the percentage of approvals necessary to approve each matter other than the election of directors.

(3) Specify the time by which a ballot must be received by the corporation to be counted.

(e) Except as otherwise provided in articles of incorporation or bylaws, a written ballot may not be revoked.

**(f) Except as otherwise provided in articles of incorporation or bylaws, ballots must be retained by a corporation until the earlier of the following:**

**(1) The date of the next annual meeting.**

**(2) One (1) year after the date the ballot was received.**

SECTION 8. IC 23-17-13-1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2008]: Sec. 1. (a) A director shall, based on facts then known to the director, discharge duties as a director, including the director's duties as a member of a committee, as follows:

(1) In good faith.

C  
o  
p  
y



(2) With the care an ordinarily prudent person in a like position would exercise under similar circumstances.

(3) In a manner the director reasonably believes to be in the best interests of the corporation.

(b) In discharging the director's duties, a director may rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by one (1) of the following:

(1) An officer or employee of the corporation whom the director reasonably believes to be reliable and competent in the matters presented.

(2) Legal counsel, **certified** public accountants, or other persons as to matters the director reasonably believes are within the person's professional or expert competence.

(3) A committee of the board of directors of which the director is not a member if the director reasonably believes the committee merits confidence.

(4) In the case of religious corporations, religious authorities and ministers, priests, rabbis, or other persons whose position or duties in the religious organization the director believes justify reliance and confidence and whom the director believes to be reliable and competent in the matters presented.

(c) A director is not acting in good faith if the director has knowledge concerning a matter in question that makes reliance otherwise permitted by subsection (b) unwarranted.

(d) A director is not liable for an action taken as a director, or failure to take an action, unless the: ~~following conditions exist:~~

(1) ~~The~~ director has breached or failed to perform the duties of the director's office in compliance with this section; **and**

(2) ~~The~~ breach or failure to perform constitutes willful misconduct or recklessness.

(e) A director is not considered to be a trustee with respect to a corporation or with respect to any property held or administered by the corporation, including property that may be subject to restrictions imposed by the donor or transferor of the property.

SECTION 9. IC 23-17-13-2.5 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2008]: **Sec. 2.5. (a) This section applies unless the articles of incorporation or bylaws of a corporation provide otherwise.**

**(b) Subject to subsection (c), a contract or transaction between:**

**(1) a corporation and one (1) or more of the corporation's**

**C  
O  
P  
Y**



members, directors, members of a designated body, or officers; or

(2) a corporation and any other corporation, partnership, association, or entity in which one (1) or more of the corporation's members, directors, officers, or members of a designated body:

(A) are members, directors, members of a designated body, or officers;

(B) hold a similar position; or

(C) have a financial interest;

is not void or voidable solely because of the relationship or interest, solely because the member, director, member of a designated body, or officer is present at or participates in the meeting of the board of directors that authorizes the contract or transaction, or solely because the vote of the member, director, member of a designated body, or officer is counted for authorizing the contract or transaction.

(c) A contract or transaction described under subsection (b) is not void or voidable as provided under subsection (b) if one (1) or more of the following apply:

(1) The:

(A) material facts as to the:

(i) relationship or interest of a member, a director, a member of a designated body, or an officer; and

(ii) contract or transaction;

are disclosed or known to the board of directors; and

(B) board of directors in good faith authorizes the contract or transaction by the affirmative votes of a majority of the disinterested directors even if the disinterested directors are less than a quorum.

(2) The:

(A) material facts as to the:

(i) relationship or interest of the member, director, member of a designated body, or officer; and

(ii) contract or transaction;

are disclosed or known to the members who are entitled to vote on the contract or transaction; and

(B) contract or transaction is specifically approved in good faith by a vote of the members who are entitled to vote on the contract or transaction.

(3) The contract or transaction is fair as to the corporation at the time the contract or transaction is authorized, approved,

C  
o  
p  
y



or ratified by the board of directors or the members.

(d) Common or interested directors may be counted in determining the presence of a quorum at a meeting of the board that authorizes a contract or transaction described under subsection (b).

SECTION 10. IC 23-17-13-5 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2008]: Sec. 5. (a) A director is not liable to a corporation or a corporation's members for a decision to take or not take action, or a failure to take any action, as a director, unless the party asserting liability in a proceeding establishes one (1) or more of the following:

(1) One (1) or more of the following, if interposed as a bar to a proceeding by the director, does not preclude liability:

(A) A provision in the corporation's articles of incorporation authorized under IC 23-17-3-2(5).

(B) Satisfaction of the requirements in section 2.5 of this chapter for validating a conflicting interest transaction.

(2) The challenged conduct consisted of or was the result of one (1) or more of the following:

(A) An action that was not made in good faith.

(B) A decision:

(i) that the director did not reasonably believe was in the best interests of the corporation; or

(ii) as to which the director was not informed to an extent the director reasonably believed appropriate under the circumstances.

(C) A lack of objectivity due to the director's familial, financial, or business relationship with, or a lack of independence due to the director's domination or control by, another person that has a material interest in the challenged conduct if the following apply:

(i) The relationship or domination or control could reasonably be expected to have affected the director's judgment respecting the challenged conduct in a manner adverse to the corporation.

(ii) If an expectation described under item (i) is established, the director has not established that the director reasonably believed the challenged conduct was in the best interests of the corporation.

(D) A sustained failure of the director to devote:

(i) attention to ongoing oversight of the activities and

C  
o  
p  
y





affairs of the corporation; or

(ii) timely attention, by making appropriate inquiry, when particular facts and circumstances of significant concern materialize that would alert a reasonably attentive director to the need.

(E) The receipt of a financial benefit to which the director was not entitled or any other breach of the director's duties to deal fairly with the corporation and the members of the corporation that is actionable under applicable law.

(b) A party that seeks to hold a director liable has the burden of establishing the following:

(1) For money damages, the following:

(A) The harm to the corporation or the members of the corporation.

(B) The harm under clause (A) was proximately caused by the director's challenged conduct.

(2) For other money payment under a legal remedy, such as compensation for the unauthorized use of corporate assets, the payment the party seeks is appropriate under the circumstances.

(3) For other money payment under an equitable remedy, such as profit recovery by or disgorgement to the corporation, the equitable remedy the party seeks is appropriate under the circumstances.

(c) This section does not:

(1) in a situation in which fairness is an issue, such as consideration of the fairness of a transaction to a corporation under section 2.5 of this chapter, alter the burden of proving the fact or lack of fairness otherwise applicable;

(2) alter the fact or lack of liability of a director under another section of this article, such as the provision governing:

(A) the consequences of an unlawful distribution under section 4 of this chapter; or

(B) a conflicting interest transaction under section 2.5 of this chapter; or

(3) affect any rights to which the corporation or a member of the corporation may otherwise be entitled under law.

SECTION 11. IC 23-17-15-6 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2008]: Sec. 6. (a) Unless **this article**, the articles of incorporation, or bylaws provide otherwise, a board of directors may create at least one (1) ~~committee and appoint at~~

**C**  
**O**  
**P**  
**Y**



1 ~~least two (2) or more committees that consist of one (1) or more~~  
 2 ~~members of the board of directors. to serve on the committees.~~

3 (b) **Unless otherwise provided under this article**, the creation of  
 4 a committee and appointment of members to the committee must be  
 5 approved by the greater of: ~~the following:~~

6 (1) a majority of all the directors in office when the action is  
 7 taken; **or**

8 (2) the number of directors required by articles of incorporation  
 9 or bylaws to take action under section 5 of this chapter.

10 (c) Sections 1 through 5 of this chapter apply to committees of the  
 11 board of directors and the members of committees.

12 (d) To the extent specified by the board of directors or in articles of  
 13 incorporation or bylaws, a committee may exercise the authority of the  
 14 board of directors under IC 23-17-12-1.

15 (e) A committee may not do the following:

16 (1) Authorize distributions.

17 (2) Approve or recommend to members **action required to be**  
 18 **approved by members under this article.**

19 ~~(A) dissolution;~~

20 ~~(B) merger;~~

21 ~~(C) sale;~~

22 ~~(D) pledge; or~~

23 ~~(E) transfer;~~

24 ~~of all or substantially all of a corporation's assets.~~

25 (3) ~~Elect, appoint, or remove directors or~~ **Subject to subsection**  
 26 **(g), fill vacancies on the board of directors or on a committee.**

27 (4) Adopt, amend, or repeal ~~articles of incorporation or bylaws.~~

28 (f) The creation of, delegation of authority to, or action by a  
 29 committee does not alone constitute compliance by a director with the  
 30 standards of conduct described under IC 23-17-13-1.

31 (g) **The board of directors may appoint one (1) or more**  
 32 **directors as alternate members of a committee to replace an absent**  
 33 **or a disqualified member during the member's absence or**  
 34 **disqualification. Unless the articles of incorporation, bylaws, or the**  
 35 **resolution creating the committee provides otherwise, in the event**  
 36 **of the absence or disqualification of a member of a committee, the**  
 37 **members present at a meeting and not disqualified from voting**  
 38 **may unanimously appoint another director to act in place of the**  
 39 **absent or disqualified member.**

40 (h) A corporation may create or authorize the creation of one  
 41 (1) or more advisory committees whose members need not be  
 42 directors.

C  
o  
p  
y



(i) A committee that has one (1) or more members who are not directors:

(1) is not a committee of the board of directors; and

(2) may not exercise any of the powers of the board of directors except to the extent the board of directors is a designated body.

SECTION 12. IC 23-17-18.5 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2008]:

**Chapter 18.5. Derivative Proceedings**

**Sec. 1.** As used in this chapter, "derivative proceeding" means a civil suit in the right of a:

(1) domestic corporation; or

(2) to the extent provided in section 9 of this chapter, foreign corporation.

**Sec. 2.** As used in this chapter, "member" includes a beneficial owner whose membership is held by a nominee on behalf of the beneficial owner.

**Sec. 3. (a)** A derivative proceeding may be brought by a director or member of a corporation.

**(b)** The plaintiff in a derivative proceeding must be a member or a director at the time the plaintiff brings the proceeding.

**Sec. 4.** A member may not commence a derivative proceeding until:

(1) a written demand has been made upon the corporation to take suitable action; and

(2) ninety (90) days have expired after the date the demand under subdivision (1) was made unless:

(A) the member has been notified earlier that the demand has been rejected by the corporation; or

(B) irreparable injury to the corporation would result by waiting for the expiration of the ninety (90) day period.

**Sec. 5.** If a corporation commences an inquiry into the allegations made in the demand or complaint under this chapter, the court may stay a derivative proceeding for a period the court considers appropriate.

**Sec. 6. (a)** A court shall dismiss a derivative proceeding on a motion by a corporation if one (1) of the groups described in subsection (b) or (f) determines in good faith after conducting a reasonable inquiry upon which the group's conclusions are based that the maintenance of the derivative proceeding is not in the best interests of the corporation.

**C  
O  
P  
Y**



1 (b) Except as provided under subsection (f), one (1) or more of  
 2 the following may make a determination that the maintenance of  
 3 the derivative proceeding is not in the best interests of the  
 4 corporation:

5 (1) A majority vote of independent directors present at a  
 6 meeting of the board of directors if the independent directors  
 7 constitute a quorum.

8 (2) A majority vote of a committee consisting of two (2) or  
 9 more independent directors appointed by a majority vote of  
 10 independent directors present at a meeting of the board of  
 11 directors, whether or not the independent directors present at  
 12 the meeting of the board of directors constitute a quorum.

13 (c) The occurrence of one (1) of the following does not by itself  
 14 make a director not independent for purposes of this section:

15 (1) The nomination or election of the director by persons who  
 16 are defendants in the derivative proceeding or against whom  
 17 action is demanded.

18 (2) The naming of the director as a defendant in the derivative  
 19 proceeding or as a person against whom action is demanded.

20 (3) The approval by the director of the act being challenged in  
 21 the derivative proceeding or demand if the act resulted in no  
 22 personal benefit to the director.

23 (d) If a derivative proceeding is commenced after a  
 24 determination has been made under this section that a derivative  
 25 proceeding is not in the best interests of the corporation, the  
 26 complaint must allege with particularity facts establishing that:

27 (1) a majority of the board of directors did not consist of  
 28 independent directors at the time the determination was  
 29 made; or

30 (2) the requirements under subsection (a) have not been met.

31 (e) If a majority of the board of directors does not consist of  
 32 independent directors at the time the determination is made, the  
 33 corporation has the burden of proving that the requirements of  
 34 subsection (a) have been met. If a majority of the board of  
 35 directors consists of independent directors at the time the  
 36 determination is made, the plaintiff has the burden of proving that  
 37 the requirements of subsection (a) have not been met.

38 (f) The court may appoint a panel of one (1) or more  
 39 independent persons upon motion of the corporation to make a  
 40 determination as to whether the maintenance of the derivative  
 41 proceeding is in the best interests of the corporation. If the court  
 42 appoints a panel under this subsection, the plaintiff has the burden

C  
o  
p  
y



1 of proving that the requirements under subsection (a) have not  
2 been met.

3 **Sec. 7. A derivative proceeding may not be discontinued or**  
4 **settled without the court's approval. If the court determines that**  
5 **a proposed discontinuance or settlement will substantially affect**  
6 **the interests of the members or a class of members of the**  
7 **corporation, the court shall direct a notice of the proposed**  
8 **discontinuance or settlement be given to the members affected.**

9 **Sec. 8. Upon termination of a derivative proceeding, the court**  
10 **may order:**

11 (1) the corporation to pay the plaintiff's reasonable expenses,  
12 including attorney's fees, incurred in the proceeding if the  
13 court finds that the proceeding has resulted in a substantial  
14 benefit to the corporation;

15 (2) the plaintiff to pay the defendant's reasonable expenses,  
16 including attorney's fees, incurred in defending the  
17 proceeding if the court finds that the proceeding was  
18 commenced or maintained without reasonable cause or for an  
19 improper purpose; or

20 (3) a party to pay an opposing party's reasonable expenses,  
21 including attorney's fees, incurred because of the filing of a  
22 pleading, motion, or other paper, if the court finds that the  
23 pleading, motion, or other paper:

24 (A) was not well grounded in fact after reasonable inquiry,  
25 warranted by existing law, or a good faith argument for  
26 the extension, modification, or reversal of existing law; and

27 (B) was interposed for an improper purpose, such as to  
28 harass or cause unnecessary delay or needless increase in  
29 the cost of litigation.

30 **Sec. 9. (a) Except as provided in subsection (b), in a derivative**  
31 **proceeding in the right of a foreign corporation, the matters**  
32 **covered by this chapter are governed by laws of the jurisdiction of**  
33 **incorporation of the foreign corporation.**

34 **(b) Sections 5, 7, and 8 of this chapter apply to a derivative**  
35 **proceeding in the right of a foreign corporation.**

36 **Sec. 10. A plaintiff in a derivative proceeding shall notify the**  
37 **attorney general not later than ten (10) days after commencing the**  
38 **derivative proceeding if the derivative proceeding involves a**  
39 **corporation that holds assets in trust or for charitable purposes.**

40 **SECTION 13. IC 23-17-13-2 IS REPEALED [EFFECTIVE JULY**  
41 **1, 2008].**

**C**  
**O**  
**P**  
**Y**

